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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 126

JAMES BUTLER ELKINS AND RAYMOND FREDERICK CLARK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

STATEMENT

The factual and procedural context of the issues tendered by the petitioners is fully developed in the petition (pp. 4-16). We set forth here only the chronology of the events which culminated in the admission of the disputed evidence in the federal criminal trial, with some further details as to what the record shows concerning some of the proceedings.[1]

[1] We adopt in this memorandum petitioners' abbreviated designations of the various parts of the record.

On March 25, 1957, prior to their trial on the federal indictment filed on February 4, 1957, the petitioners moved for the return of seized property and its suppression as evidence, praying, *inter alia*, that the court order the return of "certain property of which defendants herein are the owners" (R. 13).[2] This motion, supported by an affidavit executed by the petitioners' counsel and various exhibits (R. 14, *et seq.*), alleged that on May 17, 1956, petitioner Clark's residence in Portland, Oregon, was searched pursuant to a warrant issued by a state court and that five tape recordings, a recording machine, and three spools of recording machine wire were seized from Mr. Clark. On May 21, 1956, petitioner Clark filed in the District Court for Multnomah County, Oregon, a motion for the return of the property and its suppression as evidence, attacking the state search warrant on the ground that it was not based on probable cause. On May 29, 1956, that court entered an order sustaining petitioner Clark's contention that the state search warrant was improperly issued and that the fruits of the search should be suppressed as evidence. The order directed that the items which had been seized be "impounded in the possession of the sheriff of Multnomah County, to be held at and released only upon the direction of the Attorney General of the State of Oregon or such higher circuit or Supreme Court before whom the matter may be heard" (R. 14, Exhibit E). Meanwhile, on May 22, 1956, a Multnomah County grand jury indicted the petitioners for the state offense of wiretapping (R. 13).

According to the further allegations of the peti-

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[2] This claim of ownership was expressly reaffirmed at the hearing on the motion (1 MS 286-287).

tioners' motion in the federal case, the Attorney General of Oregon deposited the tape recordings and other paraphernalia with the Oregon State Police for safekeeping and the police in turn lodged them in a safe-deposit box in a bank in Milwaukie, Oregon. On September 5, 1956, F.B.I. Agent Ronald E. Sherk obtained and executed at the bank a federal search warrant for these items, thus bringing them into federal custody (R. 13, 14).

The motion further alleged that during the week of September 15, 1956, both petitioners moved in the Oregon Circuit Court for Multnomah County for suppression of the tape recordings and other items as evidence in the state prosecution. The circuit court held on September 17, 1956, that the search and seizure of May 17, 1956, were illegal, because they were based on a faulty state warrant, but did not order either suppression or return of the property. Instead, the court ordered that it be turned over to the Attorney General of Oregon, to be held by him pending the further order of the court (R. 14, Exhibit F).

At a four-day hearing on the petitioners' motion to suppress in the federal criminal prosecution, it was shown that the tape recordings which the state officers found in their search of petitioner Clark's home on May 17, 1956, appeared to be recordings of telephone conversations taken directly from telephone wires (2 MS 309-311). The federal authorities had nothing to do with that search and had no knowledge of it (1 MS 66-67, 83). Mr. Schrunk, the then sheriff of Multnomah County, had called the F.B.I. some two to four days after the search (1 MS 86, 107-108, 127-129). The tape recordings had been played for F.B.I.

Agent Sherk at that time (1 MS 171). The state indictment filed on May 22, 1956, five days after the search, was for the state offense of wiretapping.

The federal search warrant issued and executed on September 5, 1956, prior to the state circuit court's order of September 17, 1956, which purported to place the property in question in the custody of the Attorney General of Oregon subject to the order of the court, was issued on the basis of Mr. Sherk's affidavit of the same date. Mr. Sherk stated in his affidavit that he had personally listened to tape recordings of intercepted telephone communications and had personal knowledge of the location of the tapes (R. 1, 2).

It was the position of the United States Attorney at the hearing on the motion to suppress that the legality or illegality of the state search under state law was immaterial, since there had not been any federal participation in that search; he said: "without saying that we either accept or disbelieve that it was or was not an illegal search and seizure, * * * for the purposes of this matter we may treat it as illegal" (1 MS 84).

On April 12, 1957, at the close of the hearing on the motion to suppress, the trial judge held that the tape recordings and other items were admissible in the federal trial since "there is no evidence in this case which this Court can find that special agent Sherk * * * or any other agent of the United States had any knowledge or information or suspicion of any kind that this [state] search was being contemplated or was eventually made * * * until they read about it in the newspaper." (2 MS 528-529). Since the evidence was thus admissible under the so-called "silver platter"

doctrine, the judge declined to decide whether Mr. Sherk made a legal search under a valid federal search warrant issued on an affidavit establishing probable cause (2 MS. 520).

On April 15, 1957, the day before the trial below began, the Oregon Circuit Court for Multnomah County, in a civil suit filed by the petitioners, entered a temporary restraining order specifically enjoining George Minielly, Terry Schrunk, Oscar Howlett, Claude Cross, Vayne Gurdane, and William Langley (and other named persons who did not subsequently testify at the federal trial), as well as "all other State and County officers or officials having knowledge of this order", from giving testimony at the petitioners' federal trial with respect to any matter "concerning the alleged illegal search and seizure of May 17, 1956, in the premises of the plaintiff Clark" and "the items allegedly illegally seized in said search."[3]

The state court's order was presented to the federal trial judge at the opening of the petitioners' trial on April 16, 1957. He ruled that "the order just read so far as it attempts to interfere with the process of this Court here before issue [*sic*] is void and is a nullity and of no force and effect" (1 Tr. 5). In an oral opinion elaborating upon his reasons for this

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[3] Complaint for Injunction, pp. 2-3. This document is contained in the certified record of the proceedings in the government's suit, filed after the conclusion of the trial below, to enjoin the petitioners from prosecuting contempt charges in the state circuit court against the state officers who had testified at petitioners' trial. The petitioners have lodged this record with the Clerk of this Court.

The petitioners' suit in the state circuit court had been dismissed as to the witness Howard R. Lonergan on the petitioners' own motion. The witness James C. Darby was not named as a defendant in that suit. *Ibid.*

ruling, he stated that state and federal courts each work in their separate spheres, but "when they come in irreconcilable conflict Federal judiciary must prevail under the [supremacy clause of the] basic constitution" (1 Tr. 6-26).[4]

The tape recordings and other paraphernalia which the petitioners had unsuccessfully sought to have suppressed were admitted in evidence (Govt. Ex. 1-5; 1 Tr. 101, 113, 120, 122, 134, 194, 227; 2 Tr. 249-250, 270, 279) and, in accordance with the trial judge's ruling that the state court's injunction was invalid, six officers and officials of the State of Oregon and Multnomah County who had been involved in the state search and seizure and custodianship of the disputed evidence and who had been specifically enjoined from testifying by the state court—George Minielly, Terry Schrunk,

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[4] The trial judge's reference to "the process of this Court" indicates that the witnesses in question had already been subpoenaed to testify at the federal trial when the state court issued its injunction. The petitioners refer (Pet. 14) to the statement—"thereafter of the persons named as defendants in said action [brought by the petitioners] in the Circuit Court of the State of Oregon for Multnomah County, the following persons were subpoenaed on behalf of the plaintiff, the United States of America, by the Clerk of the United States District Court for the District of Oregon, to give testimony in said cause * * *: George Minielly, Terry Schrunk, William M. Langley, Vayne Gurdane, Claude Cross, Oscar Howlett and Howard Lonergan"—which appears on page 8 of the government's complaint for an injunction against the petitioners (see fn. 3, p. 5, *supra*) and is repeated verbatim at page 8 of the restraining order issued by the federal court pursuant to that complaint, as indicating that the federal court's subpoenas were issued after the state court had issued its injunction. On the other hand, the state court's injunction recited that the petitioners' suit was dismissed as to the witness Lonergan on the petitioners' own motion for the reason that "he had not been subpoenaed in Federal Court" (Complaint for Injunction, p. 2). The clear implication from this is that the other named defendants in that suit had been subpoenaed.

Oscar D. Howlett, Claude F. Cross, Vayne Gurdane, and William Langley—were directed to and did testify at the trial below (4 Tr. 569-570, 573-577; 5 Tr. 799-804; 6 Tr. 808; 7 Tr. 1089-1094, 1152-1159, 1195, 1198-1199, 1202; 8 Tr. 1241-1244, 1265-1268, 1389-1391).

DISCUSSION

1. In *Rios* v. *United States*, No. 52, O.T. 1959, the second question listed in the limited grant of certiorari is whether, "If the evidence [in question] was unlawfully obtained, [it was] admissible in the federal prosecution of petitioner because it was obtained by state officers without federal participation." 359 U.S. 965. In this case, as in *Rios*, (1) the evidence was originally obtained by local officers without federal participation,[5] (2) state courts have concluded that the search and seizure were illegal under state law, and (3) the evidence was nevertheless admitted in the federal prosecution.[6] On the other hand, in the *Rios* case, unlike the situation here, the trial court ruled that it was not bound by the state court's order suppressing the evidence. It made an independent inquiry into the validity of the state search and seizure and found that there was probable cause to justify the arrest and search. The trial court's ruling and finding were sustained by the Court of Appeals. In view of

[5] The petitioners concede (Pet. 22) that they "are bound by the concurrent findings of the court below that there was no federal participation in the illegal state search and seizure."

[6] The Court of Appeals cited, *inter alia*, its own decision in *Rios* v. *United States*, 256 F. 2d 173, for the proposition that an unlawful state search without federal participation does not render the evidence seized inadmissible in a federal prosecution (Pet. App. A9).

these holdings below, the first question on which certiorari was granted in *Rios* is whether, "Independently of the state court's determination, * * * the evidence used against petitioner in the federal prosecution [was] obtained in violation of his rights under the Constitution of the United States." Consequently, in deciding the *Rios* case, the Court may not reach the issue concerning the "silver platter" doctrine involved in the second question.

Nevertheless, in view of the facts (1) that the "silver platter" rule was the exclusive basis for the decision of the trial court below and one of the grounds of decision in the Court of Appeals (see p. 9, *infra*) and (2) that the present vitality of that rule is before the Court in *Rios*, we do not oppose certiorari on that issue as it is involved in this case (see Pet. 21-24).

2. Although the petitioners would have it otherwise (Pet. 17-21), the action of the state circuit court in attempting to enjoin the state and county officers from testifying at the petitioners' trial concerning the evidence seized under the state warrant does not present a situation which is precisely the converse of that involved in *Rea* v. *United States*, 350 U.S. 214. In that case the state prosecution was initiated on a complaint sworn to by the federal agent who had made the unlawful search and seizure which resulted in the federal court's order suppressing the evidence. Here, the federal prosecution was initiated, not by the offending local officers, but by federal officers. Furthermore, the state court attempted to enjoin testimony by state officers who at the time were under federal subpoenas to appear in the federal prosecution. In *Rea*, it was not shown that the federal officer had been served with

state process (see the Government's Brief, No. 30, O.T. 1955, p. 4). We therefore believe that this case involves, not a question of comity between state and federal courts, as the petitioners argue, but the right of federal courts to be free from interference by state courts. If federal courts should refuse to intervene in state criminal proceedings once begun, *Stefanelli* v. *Minard*, 342 U.S. 117, 120, surely state courts have no authority to interfere with a federal prosecution.

The questions raised by this aspect of the case are, however, closely related to the "silver platter" issue discussed above. We therefore do not oppose certiorari on these questions.

3. The petitioners contended in the trial court and in the Court of Appeals that the search and seizure under the federal warrant were unlawful. The Court of Appeals considered this contention and found no merit in it (Pet. App. A9-A11. The petitioners do not now affirmatively assert that this warrant was invalid. They do claim that the trial court did not permit them, at the hearing on their motion to suppress, to make full inquiry into the basis and extent of F.B.I. Agent Sherk's knowledge in executing the affidavit for the warrant, ruling instead that this was immaterial because the evidence was admissible under the "silver platter" doctrine, and that in these circumstances it was error for the Court of Appeals to sustain the conviction on the independent ground that the search and seizure under the federal warrant were valid (Pet. 24-26).

Having pressed the issue as to the validity of the warrant in the Court of Appeals, the petitioners are in a poor position to put that court into error for con-

sidering it. Again, however, since Mr. Sherk's knowledge and, hence, his showing of probable cause, were based primarily on what he learned from listening to the tape recordings a few days after thay had been seized by the state officers and before the initial suppression order of the District Court for Multnomah County (see pp. 2-4, *supra*), the question as to the validity of the federal warrant (which the petitioners now seemingly seek to avoid) and the question urged by the petitioners as to the propriety of the Court of Appeals' action in considering and sustaining its validity, are interrelated with the other issues involved in this case. Accordingly, we also do not oppose certiorari on this final issue tendered by the petitioners, which inevitably involves, in our view, the admissibility of the disputed evidence on the basis of the federal warrant.

Respectfully submitted.

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